No. 15186

In The

United States Court of Appeals

For the Ninth Circuit

JENNIE R. DUFF AND ELIZABETH BRONSON,
Appellants,

vs.

H. L. PAGE,
Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Nevada

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ANSWERING BRIEF OF APPELLEE

I.

STATEMENT OF THE CASE

Appellee accepts Appellants statement of the facts of the case as being substantially correct so far as they go, and in accordance with the District Court's statement of the agreed facts, as modified somewhat by the evidence at the trial.

The defendant contends that he was rightfully parked on the highway in the process of assisting another car with a trailer back onto the highway, and that the plaintiffs had a clear, unobstructed view as they approached the wrecker for approximately .4 of a mile; that a red blinker light was operating on top of the wrecker. Defendant contends that the evidence clearly shows that plaintiff John A. Duff

was driving at an excessive rate of speed, failed to keep a proper lookout and failed to keep his car under proper control, and that such negligence on the part of said plaintiff was the sole, direct and proximate cause of the accident and of any injuries sustained by any of the plaintiffs.

II.

APPELLEE'S ANSWERS TO APPELLANTS' SPECIFICATION OF ERRORS

Appellee numbers the points in this brief in the same manner as they have been numbered in that portion of Appellants Opening Brief entitled Specification of Errors, commencing near the bottom of page 6 of such brief.

THE COURT DID NOT ERR AS CLAIMED BY PLAINTIFFS:

1. THE QUESTION AS TO WHETHER OR NOT THE JURORS OWNED ANY STOCKS OR BONDS IN THE AMERICAN CASUALTY COMPANY WAS IMPROPER.

The purpose of the examination of a juror is to ascertain his qualifications as a juror and whether or not there is any bias or prejudice on his part which would prevent the parties from having a fair trial. The examination is not intended as an opportunity for either of the parties to bring out that the other party may or may not be covered by liability insurance. The fact that one of the jurors may be interested in or connected with any insurance or casualty company that may be interested in the case as an insurer of the defendant's liability is material, and where there is

any reason to believe that this is the case, it should be gone into on the voir dire examination. However, the examination must be conducted in good faith and should not go beyond that point which is reasonably necessary to elicit the desired information. In a Utah decision, *Balle v. Smith,* 17 P. (2) 227, it was held:

> "The object of an examination of a juror on his voir dire is to ascertain whether he has the statutory qualifications of a juror, and having the statutory qualifications, whether there are grounds for a challenge for either actual or implied bias and to enable the party to exercise intelligently his peremptory challenges. State v. Morgan, 23 Utah 212, 64 P. 356; Tavilonis v. Valentine, 120 Ohio St. 154, 165 N. E. 730. We hold, therefore, following the great weight of authority and the better reasoning, that counsel for plaintiff is entitled to learn whether any juror is interested in or connected with any insurance or casualty company that may be interested in the case as an insurer or defendant's liability. Clearly one interested in such an insurance company as stockholder or employee would be subject to challenge. *The examination must be in good faith and precaution taken to ask the questions in such manner as will not convey the impression that the defendant is in fact insured. It would be misconduct on the part of counsel for plaintiff in such actions to so frame his questions that they go beyond what is reasonably necessary to serve the legitimate purpose of eliciting the fact that he is entitled to adduce in order to secure a jury free from bias and prejudice.* Daniel v. Asbil, 97 Cal. App. 731, 276 P. 149."

Following the spirit of this decision, a later Utah decision, *Saltas v. Affleck,* 105 P. (2) 176, (1940) held that it was error for counsel to ask each juror if he were an officer or a stockholder of the particular insurance company in which the defendant's insurance was carried.

Other cases holding that the examination of the jurors in this regard must be conducted in good faith are:

Wheeler v. Rudeck, 397 Ill. 438, 74 N. E. (2) 601, (1947);

Ewing-Von Allmen Dairy Co. v. Godwin, 200 S. W. (2d) 103, (Ky. 1947).

A good case illustrating the manner in which this examination should be undertaken, if at all, is the case of *Safeway Cab Service Company v. Miner,* 180 Okla. 448, 70 P. (2) 76. There it was said that the proper procedure is for counsel to ask a juror if he owns stock in any corporation or is employed by one. If he answers in the negative, further questions are unnecessary. If, however, he answers in the affirmative, inquiry as to the type of corporation is proper. If the answer discloses that it is a corporation other than the one engaged in the insurance business, further questions are unnecessary. If the answer discloses that it was an insurance company, then pertinent and specific questions are proper in order to establish the prospective juror's partiality.

In this case, the jurors had each been asked for their occupations, and it appeared that none of them worked for an insurance company. The specific question as to whether or not they owned and stocks or bonds in the American Casualty Company could have been designed to have only one purpose, that is, to put before the jury the fact that the defendant carried insurance in that company. For that reason it was properly refused.

2. IT WAS NOT ERROR TO RESTRICT PLAINTIFFS FROM RE-EXAMINING THE WITNESS,

EARL REMINGTON, CONCERNING HIS STATEMENT THAT DUFF WAS DRIVING TOO FAST.

It is true that when one party is permitted to bring out or have a witness testify concerning matters which have not been covered on direct examination, the other party should be entitled to go into these matters upon re-direct examination. However, that is not the point here. The question on cross-examination of this witness went to the same general subject matter as had been covered in the direct examination, and was intended merely to show the credibility of the witness' direct examination. Plaintiffs' attempt to go into this statement on re-direct was merely an attempt either to re-establish his witness or to get inadmissible evidence before the court.

If it were intended to re-establish the witness, the question was improper by reason of the fact that it was not directed toward the pertinent point, that is, whether or not the witness had made such a statement.

> "The credibility of a witness impaired by an accusation that he has made statements at variance with his testimony on the witness stand may be re-established by evidence in reply that he never made the inconsistent statements attributed to him." *58 Am. Jur., Sec. 809, page 452.*

If the question were intended to get other evidence before the court, it was incorrect because prior statements inconsistent with statements made on the witness stand are not intended to and cannot be accorded any value as substantive evidence.

> "But the rule generally followed is that such previous inconsistent statements of the witness cannot be

> accorded any value as substantive evidence. Not having been made in the presence or hearing of the party, nor under the circumstances as to bind him, they are merely hearsay. Their only office and use is to impeach the witness and to negative or neutralize his testimony. In short, the impeaching and contradictory statements are admitted only to destroy the credit of the witness, to annul and not to substitute his testimony." *58 Am. Jur., Sec. 804, page 449.*

The questions asked were further objectionable upon the ground that they were repetitious, that is, they covered the same material which had been covered upon direct and cross-examination, and for that reason were not the proper subject of re-direct examination. Further, the questions were leading and suggestive.

3. THE COURT DID NOT ERR IN REFUSING TO ALLOW PLAINTIFFS TO SHOW THAT IT WAS PRACTICABLE TO TOW THE TRAILER IN SOME OTHER MANNER.

One of the ultimate questions in this case is whether or not the defendant was negligent in the manner in which he attempted to pull the trailer back up onto the highway. The fact that he might have done it in some other manner is immaterial, the question being whether or not the manner in which he was doing it was negligent.

Expert testimony is available to show different methods of doing work, mechanical or otherwise, where the subject is beyond the knowledge, understanding and ordinary comprehension of the average juror. To illustrate, the manner in which a surgical operation should be performed would be a matter of expert testimony. On the other hand, the

manner of driving an ordinary automobile is a matter of common knowledge and understanding and would not require the testimony of an expert.

As is stated in *20 Am. Jur., Sec. 780, page 650:*

> "Though permitting opinions of expert witnesses to be given in evidence is chiefly applicable to cases in which, from their very nature, the facts disconnected from such opinions cannot be clearly presented to the jury so as to enable them to pass thereon with the requisite knowledge and informed judgment, the governing rule deducible from the adjudicated cases seems to be that the subject must be one of science or skill, or one of which observation and experience has given the opportunity and means of knowledge which exist in reason rather than descriptive facts, and, hence cannot be intelligently communicated to others not familiar wtih the subject so as to possess themselves of a full understanding of it. Expert testimony is admissible only where, by reason of peculiar skill and experience, inferences can be drawn from facts, which an ordinary untrained mind cannot deduce or where such testimony relates to a subject which is not within the average experience and common sense of the jury. Expert opinion testimony is never admissible where the subject is one of common knowledge as to which facts can be intelligently described to the jury and understood by them, and they can form a reasonable opinion for themselves. Furthermore, the facts on which an expert opinion is based must permit of reasonably certain deductions as distinguished from mere conjectures."

In *DeMarais v. Johnson,* (Mont.) 3 P. (2) 283, cited in plaintiffs' brief, it was held that a garageman of thirteen years experience could testify that loose spokes caused the collapse of a truck wheel on the ground:

> "The opinion of garageman was competent, since it

> dealt with a question concerning which the mass of mankind could not reach as intelligent a conclusion as could one who had had experience with the effect of loose spokes in a wheel."

However, in citing that case, the court quoted other Montana cases with approval as follows:

> "The necessity for opinion evidence only exists where the facts in controversy are incapable of being detailed and described so as to give the jury an intelligible understanding concerning them; but when the facts are such as can be detailed or described, and the jury are able to understand and draw a correct conclusion from them without such opinion evidence, the necessity for it does not exist."

The operation of pulling the trailer back onto the highway was not such an involved or technical operation as to be incapable of being described so as to give the jury an intelligible understanding of the operation. Moreover, the testimony was objectionable upon the grounds that it would have been an invasion of the province of the jury, that is, it would have called for an opinion on one of the ultimate facts to be decided by the jury.

> "One of the objections most frequently raised against the admission of expert opinion testimony is that the opinion offered invades the province of the jury. This objection is indeed the basis of the general rule of evidence that the testimony of witnesses must be confined to concrete facts, perceived by the use of their senses, as distinguished from opinions and conclusions deducible from evidentiary facts. Opinion testimony of experts is only admissible in cases of necessity, where the proper understanding of facts in issue requires some explanation of those facts or some deduction therefrom by persons who have scientific or specialized knowledge or experience. Such testimony

> does, in a broad general sense, encroach upon the province of the jury; and when it relates to matters directly in issue, it should not be admitted unless its admission is demanded by the necessities of the individual case." *20 Am. Jur., Sec. 782, page 653.*

The proffered testimony was further objectionable for the reason that no proper foundation was laid. In order to qualify this type of opinion evidence, it must be shown that the opinion is based on conditions, including road conditions, weather conditions, type of equipment, time of day and so on, which are the same as those actually shown to exist at the time of the actual incident. The person giving such an opinion must be shown to have had experience with the same type of equipment and under the same conditions as that to which he is testifying. In the case at bar, there was no such foundation laid and the testimony is, therefore, inadmissible on that ground.

In conclusion then, the proffered testimony was inadmissible for a number of reasons. To prove that an act may have been done differently than it was done is not proof of negligence. In order for expert testimony to be introduced, the opinion of the expert must be shown to rest on conditions and experience similar to those actually in existence at the time of the matter testified to. Assuming, however, that a sufficient foundation was laid, expert testimony is inadmissible when it goes to matters which are within the common experience and knowledge of the jurors and about which they can make a decision without the assistance of an expert especially when the opinion called for is one of the very ultimate issues of fact to be decided

by the jury. The offered testimony was not admissible as custom and usage.

The testimony that it would have been practicable to tip the trailer on its wheels with the tow car on the shoulder and then pull the trailer up the embankment and onto the road, a different manner than was being employed by the defendant in this case, was obviously not intended as testimony going to prove custom and usage. It is evident that the manner in which a trailer might be pulled up an embankment and onto a highway would vary depending upon the particular circumstances in each case, such as the size of the trailer, the weight of the trailer, the height of the embankment, the steepness of the shoulder and the like.

The most obvious example of evidence of this character is evidence that the person charged failed to take or furnish safety precautions which were customarily furnished. For instance in the case cited in plaintiffs' brief, *Burke v. Marshall, Inc.,* (Cal.) 108 P. (2) 738, the safety precaution which was customary was that trucks would blow their horns while approaching workers on a dock.

Testimony that it might have been more practical to have towed the trailer in a different manner does not show any custom or usage, the variation from which would be negligence.

4. PLAINTIFFS WERE NOT PREJUDICED BY THE COURT'S FAILURE TO STRIKE DEFENDANT'S STATEMENT THAT THE TOW TRUCK WAS AN EMERGENCY TRUCK.

The plaintiffs complain of the refusal of the Court to strike the defendant's statement that his tow truck was an

emergency vehicle. In view of the Court's instruction regarding the rights, responsibilities and duties of the parties, it is not seen how this statement could have had any prejudicial effect upon the outcome of the case. To assume that it did is to assume that the jury disregarded all of the instructions of the court and applied their own ideas on the law applicable to emergency vehicles, a result not warranted by the outcome of the case.

5. THE OFFERED TESTIMONY AS TO THE PUTTING OUT OF FLAGS AND OTHER WARNINGS WAS COVERED BY OTHER WITNESSES.

Moreover, failure to admit evidence in this regard would not prejudice the plaintiff if the evidence affirmatively shows that the defendant's vehicle was visible for a great distance and could be as readily seen as any signal or flag would have been seen so that the absence of a signal or flag was not a proximate cause of the accident.

6. THE COURT DID NOT ERR IN GIVING CERTAIN INSTRUCTIONS TO THE JURY.

We are somewhat taken aback by plaintiffs' assertion in discussing Instruction No. 12 that a driver is not obligated to keep a lookout and to see that which is plainly or clearly visible.

As stated in *Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 1, Part II, page 571:*

> "A motorist must use his eyes and see seasonably that which is open and apparent.

> "In other words, the duty of looking ahead imposes upon the driver, whether of an automobile or of domestic animals, the obligation to see whatever there may be in the line of his vision, for a reasonable distance, which will affect his driving, and, if his view is unobstructed, he will be held in law to have seen persons on the street in front of him, and will be deemed negligent as a matter of law if he fails to see that which should have been obvious."

The cases cited in plaintiffs' brief holding that one was not necessarily negligent under the circumstances of the particular case to see an object are in many instances not appropro since the question in those cases was whether or not the person was guilty of negligence as a matter of law. The question was, in this case, submitted to the jury to determine the issues in favor of the defendant.

The key words in the instruction are that the person must see that "which is plainly or clearly visible." There still exists the question of whether or not the defendant's vehicle was plainly or clearly visible, which was to be decided and has been decided by the jury. If they believed under the evidence that the defendant's vehicle was not clearly or plainly visible, then they may have excused the plaintiffs' failure to see the defendant's vehicle. Most of the plaintiffs' argument is addressed to this point, that is, that the defendant's vehicle was not clearly or plainly visible, which has been resolved against them by the jury. The fact that there may have been a difference of opinion as to whether or not the vehicle was plainly or clearly visible did not make the instruction erroneous.

7. PLAINTIFFS' REQUESTED INSTRUCTION No. A SHOULD NOT HAVE BEEN GIVEN.

Plaintiffs complain of the refusal of the Court to give their Instruction No. A in regard to the rights of the plaintiffs to join their actions and that the jury should determine their rights separately. The plaintiffs are correct in their assertion that the rights of the various plaintiffs should be dealt with separately in those instances wherein their rights under the particular circumstances differ. However, a reading of all the instructions given by the Court will show that the Court did not confuse the rights of the plaintiffs, but adequately instructed the jury that in those instances in which the case required they may be dealt with separately.

8. PLAINTIFFS' REQUESTED INSTRUCTION No. G SHOULD NOT HAVE BEEN GIVEN.

Plaintiffs were not prejudiced by the Court's refusal to give Plaintiffs' offered instruction "G" to the effect that a wrecker truck or tow truck is not an emergency vehicle, for the same reason that plaintiffs were not prejudiced by the Court's failure to strike defendant's statement that the tow truck was an emergency truck, as set forth in No. 4, page 10 this brief, in view of the Court's instruction regarding the rights, responsibilities and duties of the parties.

9. PLAINTIFFS' REQUESTED INSTRUCTION No. I SHOULD NOT HAVE BEEN GIVEN.

The Court did not err in refusing to give plaintiffs' requested instruction "I". This instruction was included

within the proposed instructions lettered A to M tendered by the plaintiffs. At page 309, Transcript of Record, the Court said "Let the record show that plaintiffs have offered certain instructions, with request that they be given, these instructions being lettered A to M, for the purpose of the offer. The Court is of the opinion that these offered instructions are included in those approved by the Court and are covered, or that they do not constitute the law applicable to this case and the evidence." We do not find in the Transcript of Record any objection made by plaintiffs to the Court's refusal to give this instruction "I". The record shows only that it was in the mentioned group of lettered instructions tendered by plaintiffs and which were refused by the Court for the stated reasons.

10. PLAINTIFFS' REQUESTED INSTRUCTION No. J SHOULD NOT HAVE BEEN GIVEN.

The Court did not err in refusing to give the plaintiffs' requested Instruction No. J. The plaintiffs claim that the Court should have instructed the jury in connection with Instruction No. 12 to the effect that "whether an object is clearly or plainly visible is a question of fact to be determined from all the surrounding circumstances." This is perhaps a correct abstract statement of the law, but is, we submit, not a proper instruction to be given considering the common sense capabilities of the jury. How else could they have understood the instructions of the Court other than that they should judge the actions of the parties with respect to the surrounding circumstances at the time?

11. The District Court did not err in refusing to grant plaintiffs' Motion for New Trial for any of the reasons contended by plaintiffs, namely, insufficiency of the evidence to justify the verdicts against the plaintiffs; that the verdicts were contrary to the evidence; that the verdicts, against the plaintiffs were against law; that errors in law occurring at the trial and excepted to by the plaintiffs and orders of the Court, as more specifically set forth in appellants' Specification of Errors, by which plaintiffs were prevented from having a fair trial.
(Transcript of Record, pages 42-44).

The Court did have power to grant a new trial had the evidence been insufficient to justify the verdict reached by the jury. The question, however, to be determined in this regard was whether the jury might have reasonably found from the evidence as they did. From the result reached, it appears that the jury found that the actions of the plaintiff, John A. Duff, were the proximate cause of the accident. It is submitted that the evidence in this case is sufficient to justify that result and that they might reasonably have so found.

It is significant that briefs were filed by the plaintiffs in the Trial Court in support of plaintiffs' Motion for New Trial and that their brief filed before this Appellate Court follows in the main such Trial Court brief, and this brief of Appellee follows the answering brief filed by defendant in opposition to plaintiffs' Motion for New Trial in the Trial Court.

It is submitted by Appellee that this Court should affirm the judgment of the Trial Court entered on the jury's verdict in favor of defendant and appellee, H. L. Page.

Respectfully submitted,

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